

Options for Southwest Florida

1. Problem. Southwest Florida is experiencing rapid growth that engenders concern whether the permit-by-permit review process is adequate to provide appropriate consideration of resulting impacts. Major projects on the horizon include a second runway for the Southwest Florida International Airport, mining activities of Florida Rock Industries, University Village, and, potentially, construction to implement a South Lee County Watershed Plan. Other projects under review include Estero Pointe, River Ridge, expansion of Pelican Landing, Brooks of Bonita Springs (Sweetwater), and M&A Ranch.

2. Requirements under Federal Law. The Federal statutes that govern the decision whether to grant a Corps Permit to fill wetlands are the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act (NEPA). The regulations that apply here include, but are not limited to: the Guidelines issued by the U.S. Environmental Protection Agency under Section 404b(1) of the Clean Water Act, published at 40 CFR 230; Fish and Wildlife regulations implementing Section 7 of the Endangered Species Act, 50 CFR part 402; regulations implementing Section 404 of the Clean Water Act for review of applications for Department of the Army permits at 33 CFR 325, in particular Appendix B which implements the National Environmental Policy Act. The first focuses on the physical, chemical, and biological integrity of the nation's waterways and requires that impacts to the aquatic environment be avoided, if practicable, and if not, be minimized and compensated ("mitigated"). The second requires the project not effect a listed species, either directly or through loss of habitat. The third requires a broad review of many factors to determine whether the project would be contrary to the public interest, including the consideration of cumulative and secondary impacts. In practice, the most difficult and recurring questions encompassed by the regulatory review process involve compensation for unavoidable wetland losses and the concern for loss of spatial habitat. These need to be addressed in a globally consistent manner to ensure both fairness and legal sufficiency in the Corps decision making process.

3. Past and Current Activities/Studies ("Efforts"). Many efforts to examine impacts to, and the future of the region, have been completed or are underway. First and foremost is the Lee County Comprehensive Plan. Other efforts include the Lower East Coast Water Supply Plan, Estero Bay Management and Improvement

Plan, Estero Bay Agency on Bay Management, Charlotte Harbor National Estuarine Program, Southwest Florida Focus Group, Southwest Florida Issues Group of the Governor's Commission for a Sustainable South Florida, Multi-Species Recovery Plan, Water Resources Development Act Critical Projects, and the Central and Southern Florida Project. The Arnold Committee looked at a portion of Lee County and provided a vision statement for the future of that area. Many individuals from the area have written expressing concerns for wetland impacts and habitat loss, but also for upland habitat loss, land acquisition for conservation, water supply, and traffic in the larger region. In addition, Region IV of the U.S. Environmental Protection Agency has expressed support for a cumulative impact study with particular emphasis on water quality and wetland issues.

4. Options. What follows is an analysis of possible options the Corps regulatory program has in evaluating common issues to all the potential projects identified.

Option #1. Continue Permit-by-Permit Review.

a. Pro.

(1) Review of Practicable Alternatives. This process is the one described in the Corps' regulations for a "Standard Permit." The review gives full attention and consideration to the individual circumstances of the particular application in determining which alternative project designs are available for consideration.

(2) Ability to Address Secondary/Cumulative Impacts. Allows Corps to revisit this issue with each application to confirm or adjust actions taken on previous similar permits or to reflect changes in knowledge.

(3) Public Involvement. This process includes mailing an individual notice requesting comments to adjoining landowners and to those who have placed their names on the mailing list. These individuals are given a set time to submit comments to the Corps project reviewer.

(4) Regulatory Certainty. Not applicable (see also discussion under "con" below.)

(5) Influence/Domination by a Single Interest. The review and decision is made by Corps. The Corps performs its review on the basis that it is neither a proponent nor opponent of a project and the decision is made in a neutral manner.

(6) Duplication/Coordination. Not applicable (see also discussion under "con" below.)

b. Con.

(1) Review of Practicable Alternatives. By focusing on the individual project applied for, the review may not be able to fully consider other concurrent planned development. As a result, the Corps does not see the entire picture of the area when analyzing potential alternatives.

(2) Ability to Address Secondary/Cumulative Impacts. These impacts are typically outside of immediate project boundaries and the information and assessment is beyond the direct control of applicant. However, each applicant is still burdened to gather that information and provide an assessment.

(3) Public Involvement. All dialog is between the individual commenter and the Corps reviewer. This Option is not a process that allows for a workshop or other process to provide for group dialog or solution-building.

(4) Regulatory Certainty. Since the process is an individualized review, the results can not necessarily be applied to a future permit review, even if the future project, on the surface, appears similar to the first. The second applicant could spend the time researching the first project files, but this would not always capture the full range of discussions that took place.

(5) Influence/Domination by a Single Interest. Not applicable (see also discussion under "pro" above.)

(6) Duplication/Coordination. Several pending applications can be undergoing review for same issue at same time. There is considerable duplication between the earlier and subsequent permit reviews since this Option forces an iterative, repetitive review of issues.

Option #2. Initiate Carrying Capacity Study.

a. Pro.

(1) Review of Practicable Alternatives. Not applicable (see also discussion under "con" below.)

(2) Ability to Address Secondary/Cumulative Impacts. Purpose of study is to identify the limits to the "capacity" of the environment to "carry" impacts under various scenarios. So, from this information, an assessment could be performed of the extent any single project contributes toward the total. The study could also identify limits for aspects that are outside the Corps direct responsibility to review.

(3) Public Involvement. Generally would be through public workshops and presentations as various technical models are developed. The process is more lengthy and more thorough as the information is developed and checked and so provides an enhanced opportunity for involvement.

(4) Regulatory Certainty. Permit reviews would use the results from the study in the reviews of secondary and cumulative impacts, therefore the applicant could assess the likely result of that review in the early stages of a project development.

(5) Influence/Domination by a Single Interest. Due to the many uncertainties in the issues being addressed by the study, every effort will be taken to gain a broad opportunity for review by as many entities as possible.

(6) Duplication/Coordination. This study would look at work already performed for specific purposes and initiate new studies as needed to update or provide particular analysis needed to determine "capacity." In this regard, will not be a duplication.

b. Con.

(1) Review of Practicable Alternatives. Generally this study would be initiated at request of local sponsor(s) and so the products are tailored for that sponsor(s) expected use. The sponsor(s) may or may not use the results of the study to then determine the practicability of alternative courses of actions.

(2) Ability to Address Secondary/Cumulative Impacts. The impacts will be only those undertaken by the study. The study must limit the range of issues in order to properly do the assessment on those, but that will leave the other issues to be addressed in another forum.

(3) Public Involvement. To participate meaningfully would require a commitment to many more meetings since

any one meeting would be incrementally building toward the final product. Also, to ensure a comprehensive scientific basis, would need a much broader buy-in of concept, including considerable commitment of time and funding from Federal, State, and Local interests.

(4) Regulatory Certainty. The study does not explicitly identify regulatory actions that will be taken as a result of the findings of how close to "capacity" the impacts are. The regulatory response will also consider other issues and solutions in each project review.

(5) Influence/Domination by a Single Interest. This is not necessarily a Corps product, though the Corps could provide management and technical oversight. Therefore, there is a risk that the process could be controlled by the sponsor or most vocal or best organized group,

(6) Duplication/Coordination. Would duplicate fundamental process of Comprehensive Land Use Planning and National Estuarine Program.

Option #3. Application-Triggered Environmental Impact Statement (EIS).

a. Pro.

(1) Review of Practicable Alternatives. The Corps' position for one project in particular, the Southwest Florida International Airport, has been that the impacts are "significant" and thereby warrant review by an EIS. Other projects on horizon, depending on their design submitted for review, by themselves, may warrant EIS review. The EIS is comprehensive enough to provide a review of practicable alternatives within the limit of the resources of the applicant to gather the information.

(2) Ability to Address Secondary/Cumulative Impacts. Allows the Corps to revisit this issue on a "major" project that, because of the size of the impacts, allows for meaningful review of potential solutions.

(3) Public Involvement. The purpose of an EIS is to provide for full disclosure to the public and opportunity for full participation. The public comments are critical to the study and the nature of analysis.

(4) Regulatory Certainty. Due to the size and public involvement of the EIS process, the analysis and information could be used in future permit reviews.

(5) Influence/Domination by a Single Interest. All the comments and responses would become part of the public record. Corps employees would oversee drafting of document to ensure an independent, non-biased nature of the information presented.

(6) Duplication/Coordination. Not applicable (see also discussion under "con" below.)

b. Con.

(1) Review of Practicable Alternatives. Since the EIS is focusing on an individual project, the Corps would still have difficulty to fully consider the effects of concurrent planned development.

(2) Ability to Address Secondary/Cumulative Impacts. These impacts are usually outside of immediate project boundaries and the information and assessment is beyond the direct control of applicant. However, the applicant is still burdened to gather and assess that information, although there may be assistance from public comments

(3) Public Involvement. Since EIS is for a single project, the participants would generally be only those most closely interested in the project, even though the issues may actually have a bearing on, or be of interest to, a wider audience.

(4) Regulatory Certainty. Since the analysis and decision is tailored to the individual project, there is no certainty that a similar analysis and/or decision would be made for a subsequent project.

(5) Influence/Domination by Single Interest. Since EIS is for a single project, it is largely based on information and analysis sponsored by the applicant. Unless the issue is particularly clear or controversial there is less likelihood of a similar effort by other parties to prepare companion submittals.

(6) Duplication/Coordination. Would in many respects duplicate similar comprehensive reviews performed for other agencies. Also, could result in multiple individual EIS's in the region.

Option #4. Programmatic Environmental Impact Statement (PEIS).

a. Pro.

(1) Review of Practicable Alternatives. Because PEIS would cover multiple projects, would provide for input of information from a number of sources to provide material for consideration of alternatives.

(2) Ability to Address Secondary/Cumulative Impacts. The purpose would be to review adequacy of how the regulatory program could make decisions on several projects on the horizon, on the basis that NEPA, the Corps public interest review, and Section 404(b)(1) Guidelines all require the assessment of the cumulative and secondary effects of those decisions.

(3) Public Involvement. Public comments are critical to developing study and nature of analysis. The purpose of a PEIS is to provide for full disclosure and an opportunity for full participation. This would address the concerns by Lee County for the Arnold Committee with regard to public dialog and participation.

(4) Regulatory Certainty. Results in greater certainty and consistency on how pertinent regulatory program issues will be addressed in subsequent permit decisions.

(5) Influence/Domination by Single Interest. Since the PEIS would cover several prospective projects there would be broad participation. All of the comments and responses would become part of the public record and Corps employees would oversee drafting of the document to ensure an independent, non-biased nature of the information presented.

(6) Duplication/Coordination. The focus is on the Corps regulatory program so is not necessarily a duplication of other efforts. The Corps program seeks to achieve consistency with other Federal, State, and Local processes so some of the same analysis would be used as provided by other efforts. Would build on work of Arnold Committee and other studies done or underway in the area.

b. Con.

(1) Review of Practicable Alternatives. The review would be broad in order to quickly address the

commonalities between the projects but individual projects would be subsequently reviewed to assess their particular circumstances.

(2) Ability to Address Secondary/Cumulative Impacts. Would be constrained by the limits of what issues the Corps has authority or concerns over to review. Would not be a comprehensive review of all possible impacts.

(3) Public Involvement. Since the focus is on the regulatory program and restricted to a subset of identified issues, some members of the public may not participate due to unfamiliarity with the regulatory program.

(4) Regulatory Certainty. New information subsequent to the PEIS could change the prospective regulatory process, not sufficiently to justify a supplemental PEIS but enough to cause some uncertainty in subsequent projects.

(5) Influence/Domination by a Single Interest. Since there is no one project "at risk," and the PEIS would be another set of meetings, there may be difficulty for some interests to fully participate simply due to the press of other business. The number of "comprehensive" efforts in the region is straining resources of participants and there is a risk that one interest may, by default, influence any one.

(6) Duplication/Coordination. The PEIS would not cover all issues of public concern, but would be solely those affected by the Corps authority. The preparation of the PEIS would require close coordination with other efforts to ensure no duplication or to utilize results.

Option #5. Cooperative Effort with the Southwest Florida Issues Group of the Governor's Commission on Sustainable South Florida.

a. Pro.

(1) Review of Practicable Alternatives. The Corps can benefit from or adopt work of other agencies, especially if the process of that group provides for full public disclosure and comment on the scoping, public comment, draft, and evaluation of alternatives.

(2) Ability to Address Secondary/Cumulative Impacts. The Issues Group has identified a very broad array of

issues and an expansive geographic area. The purpose is apparently to provide a comprehensive review of all factors and all pending or proposed activities. Although the Corps is interested in a subset of the broad array of issues, the broader review would complement the Corps' issues and requirements.

(3) Public Involvement. The Issue Group is large and comprehensive in scope and so would attract participation. The process is open. Since the Group has already planned for a series of public forums, their meetings and the Corps' requirements for public involvement coincide.

(4) Regulatory Certainty. The other Options essentially focus on the Corps regulatory program. The results of the Issue Group may be used by a wider variety of other agencies in their programs. This will enhance the certainty of coordinated/similar response to an issue or project.

(5) Influence/Domination by a Single Interest. The Issue Group provides a broad range of special interests an opportunity. The Corps will still independently make regulatory decisions.

(6) Duplication/Coordination. Could act as umbrella to incorporate results from other efforts.

b. Con.

(1) Review of Practicable Alternatives. The work of the group would be broad in order to quickly address the major, similar issues but individual projects would be subsequently reviewed to assess their particular circumstances.

(2) Ability to Address Secondary/Cumulative Impacts. Not applicable (see also discussion under "pro" above.)

(3) Public Involvement. Not applicable (see also discussion under "pro" above.)

(4) Regulatory Certainty. The Issue Group's work may or may not be accepted and used in Comprehensive Plans and other processes, therefore uncertainty may be introduced as the Corps attempts to coordinate with those local efforts.

(5) Influence/Domination by a Single Interest. Not applicable (see also discussion under "pro" above.)

(6) Duplication/Coordination. Not applicable (see also discussion under "pro" above.)

5. Recommendation. The preliminary conclusion is that Option #5 (Southwest Florida Issues Group) provides best avenue to satisfy the Corps' needs in this region. This recognizes that: the issues which the Corps focuses on are but a small part of all the issues to be addressed by this group; that this is a larger on-going process; the process is designed to build on what has already been accomplished; provides an exceptional opportunity for public involvement; and, the work of this group may be adopted or used by other agencies which would provide an opportunity for building consistency between the Corps regulatory program and the State and Local processes.